

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

DAVE MORGAN, on behalf
of himself and all others
similarly situated,

No. 2:03-cv-2228-MCE-JFM

Plaintiff,

v.

ORDER

COUNTY OF YOLO, a political
subdivision of the State of
California, E. G. PRIETO,
individually and in his
capacity as Sheriff for the
County of Yolo,

Defendants.

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Plaintiff Dave Morgan ("Plaintiff"), a former Deputy Sheriff
with Defendant County of Yolo ("County"), instituted this lawsuit
to obtain a judicial determination that enforcement of his
Employment Contract with the County would violate the Fair Labor
Standards Act, 29 U.S.C. § 201 et seq. ("FLSA") as well as the
provisions of 42 U.S.C. § 1983 and various state laws.

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1 In executing that Employment Contract, Plaintiff agreed to repay
2 the County for both academy training and background investigation
3 costs in the event he terminated his employment as a Deputy
4 Sheriff within the first thirty-six months. The County filed
5 suit against Plaintiff in state court to recoup its costs in that
6 regard when Plaintiff left his employment less than a year after
7 signing his employment agreement. Plaintiff responded by
8 instituting the present action, and by Memorandum and Order filed
9 June 29, 2006, this Court granted Defendants'¹ Motion for
10 Judgment on the Pleadings on grounds that this action became moot
11 once the County dismissed the underlying state court action, with
12 prejudice, on November 23, 2005. Defendants now move to recover
13 attorneys' fees under 28 U.S.C. § 1927 on grounds that Plaintiff
14 "unreasonably and vexatiously" prolonged this case by refusing to
15 dismiss this case following dismissal of the state action.
16 Defendants alternatively contend that Plaintiff's claim premised
17 on 42 U.S.C. § 1983 lacked merit from the onset. They
18 consequently seek to recoup \$43,799.00 in attorneys' fees (for
19 defense of this action from start to finish), arguing that
20 because Plaintiff § 1983 claim was both "frivolous, unreasonable
21 or without foundation" and "inexorably intertwined" with the
22 remainder of the lawsuit, any apportionment of defense costs
23 between the § 1983 claim and other claims asserted by Plaintiff
24 in his lawsuit is impossible.

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28 ¹ Plaintiff named Yolo County Sheriff E. G. Prieto as a
Defendant along with Yolo County itself.

1 As set forth below, Defendants' Motion is granted, in part.²

2 28 U.S.C. § 1927 allows the Court to sanction a party for
3 unreasonably and vexatiously prolonging a case. Permissible
4 sanctions include attorneys' fees reasonably incurred as a result
5 of the offending party's conduct, with the statute providing as
6 follows:

7 "Any attorney or other person admitted to conduct cases in
8 any Court of the United States or any Territory thereof who
9 so multiplies the proceedings in any case unreasonably and
10 vexatiously may be required by the court to satisfy
personally the excess costs, expenses, and attorneys' fees
reasonably incurred because of such conduct."

11 The "unreasonable and vexatious" requirement of § 1927 is
12 tantamount to a finding of subjective bad faith present when an
13 attorney knowingly or recklessly raises a frivolous argument or
14 unmeritorious claim for purposes of harassing an opponent. New
15 Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1306 (9th Cir.
16 1989); Estate of Blas v. Winkler, 792 F.2d 858, 860 (9th Cir.
17 1986).

18 According to Defendants, Plaintiff's insistence on
19 continuing to pursue his federal action once the County dismissed
20 its state court claim in February of 2005 brings his conduct
21 within the purview of § 1927, and hence justifies the award of
22 attorneys' fees.

23 As Defendant County concedes, however, its original February
24 2005 dismissal of the state court action was without prejudice.
25 (Decl. of J. Scott Smith, ¶ 4).

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27 ² Because oral argument will not be of material assistance,
28 the Court ordered this matter submitted on the briefing. E.D.
Cal. Local Rule 78-230(h).

1 That designation caused the Ninth Circuit, who heard Plaintiff's
2 appeal from this Court's decision to stay these proceedings
3 pending resolution of the County's state court lawsuit, to
4 determine that the matter was not yet moot. As the Ninth
5 Circuit's November 15, 2005 Memorandum Disposition stated:

6 "We decline to hold that the whole case has now become moot.
7 The dismissal of the County action without prejudice does
8 not preclude it from continuing to press its contract claim,
9 and does not meet the stringent mootness standards regarding
the case itself. Also, the controversy that Morgan has with
the County is not resolved."

10 (Mem. Dispo., p. 3, Ex. "C" to the Decl. of J. Scott Smith filed
in support of Motion for Judgment on the Pleadings).

11 It was only after receipt of this ruling that the County
12 amended its dismissal of the state court action to terminate the
13 lawsuit with prejudice. Plaintiff still refused to voluntarily
14 dismiss the present case, however, which prompted Defendants to
15 move for judgment on the pleadings. By Memorandum and Order
16 filed June 29, 2006, this Court granted that motion on grounds
17 that the entire controversy had become moot.

18 As the Ninth Circuit's decision made clear, Plaintiff's
19 conduct in refusing to dismiss his action in the face of a
20 dismissal without prejudice, only, cannot constitute sanctionable
21 conduct justifying the award of attorneys' fees under § 1927.
22 Plaintiff's controversy with the County was not yet extinguished
23 given the equivocal nature of that dismissal. Once the County
24 amended its dismissal to include a "with prejudice" designation,
25 however, that controversy was definitively put to rest.

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1 As set forth in the Court's June 29, 2006 Memorandum and Order,
2 the November 2005 dismissal not only precluded any claims under
3 the Fair Labor Standards Act, but also mooted Plaintiff's other
4 claims, which alleged violations of rights stemming from
5 enforcement of his Employment Contract.

6 The Court finds that Plaintiff's refusal to dismiss the
7 action after the November 23, 2005 dismissal with prejudice,
8 despite defense counsel's letter of November 30, 2005 requesting
9 such dismissal (see Ex. "B" to the Decl. of J. Scott Smith), did
10 constitute an unreasonable multiplication of proceedings calling
11 for § 1927 sanctions. Plaintiff simply had no legally
12 justifiable reason for continuing to maintain this lawsuit once
13 the County unequivocally abandoned any attempt to enforce the
14 Employment Agreement that formed the basis for the present
15 action. Sanctions in the amount of defense counsel's billings
16 after November 30, 2005 will therefore awarded pursuant to § 1927
17 in the amount of \$5,332.50.³

18 We next turn to Defendants' alternative request for
19 attorney's fees under 42 U.S.C. § 1988, which provides that a
20 prevailing party in a § 1983 action may, in the court's
21 discretion, be awarded a reasonable attorneys' fee. Such fees
22 should be awarded, however, only where the underlying § 1983
23 action is frivolous, unreasonable, or without foundation, and not
24 because simply because the plaintiff ultimately failure to
25 prevail on the claim. Hughes v. Rowe, 449 U.S. 5, 14 (1980).

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27 ³ This figure is derived from defense counsel's February 17,
28 2006 billing for attorneys' fees in the amount of \$858.00, plus
the subsequent June 21, 2006 billing for \$4,674.50. See Ex. "D"
to the Decl. Of J. Scott Smith.

1 This is a stringent burden.

2 Defendants argue that there was never any basis for a § 1983
3 claim, and as indicated above contend that they should be
4 recompensed for their entire \$43,799.00 in attorneys' fees
5 because the fees incurred in defending the § 1983 claim cannot be
6 separated from fees incurred in defending the case as a whole.

7 The Court rejects Defendants' contention that Plaintiff's §
8 1983 claim was entirely frivolous so as to merit the award of any
9 attorneys' fees under § 1988. In support of his § 1983 claim,
10 for example, Plaintiff claims that the unconstitutional
11 conditions doctrine (pursuant to which a governmental entity
12 cannot exact waivers of certain rights as a condition of
13 benefits) applies in that Plaintiff was required to waive his
14 property right to wages in signing an employment contract
15 requiring reimbursement of those wages under certain conditions.
16 The validity of the unconstitutional conditions doctrine has been
17 recently recognized by the Ninth Circuit in U.S. v. Scott, 450
18 F.3d 863, 866 (9th Cir. 2006). While Scott is admittedly
19 factually distinguishable from the case at bar, in involving
20 waivers of Fourth Amendment rights as opposed to the property
21 rights alleged by Plaintiff herein, that does not mean that
22 Plaintiff's attempt to expand application of the doctrine to the
23 present case is patently frivolous and/or unreasonable pursuant
24 to the high bar set for an award of attorneys' fees under § 1988.
25 A good faith attempt to launch a novel theory does not merit §
26 1988 assessment of attorneys' fee for undertaking such an effort.
27 Legal Servs. of N. Cal., Inc. v. Arnett, 114 F.3d 135, 141 (9th
28 Cir. 1997).

1 Based on the foregoing, Defendants' Motion for Attorneys'
2 Fees is GRANTED in the amount of \$5,332.50 pursuant to 28 U.S.C.
3 § 1927. Given the language of the statute, which provides that
4 an offending attorney may be required to "satisfy personally"
5 attorneys fees made necessary by his unreasonable and vexatious
6 conduct,⁴ attorney Webster is ordered to remit that amount to
7 counsel for Defendants not later than thirty (30) days following
8 the date of this Order. Defendants' request that the remainder
9 of attorneys' fees expended in this litigation be awarded under
10 either § 1927 or 42 U.S.C. § 1988 is, however, DENIED.

11 IT IS SO ORDERED.

12 DATED: September 18, 2006

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16 MORRISON C. ENGLAND, JR.
17 UNITED STATES DISTRICT JUDGE
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27 ⁴See also New Alaska Dev. Corp. v. Guetschow, 869 F.2d at
28 1306 ("[t]he statute only authorizes sanctions against [the
lawyer] in his capacity as attorney").